(2)

No. 90-1491

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

UNION BANK,
Petitioner,
v.

HERBERT WOLAS, Chapter 7 Trustee for the Estate of ZZZZ BEST CO., INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly hold that transfers in connection with the revolving line of credit extended by Petitioner to ZZZZ Best Co., Inc. constituted voidable preferences on a long-term loan thereby excluding it from protection under 11 U.S.C. § 547(c)(2)?

If the Court concludes that 11 U.S.C. § 547(c)(2) protects payments on account of long-term loan obligations, then the following additional questions are presented for determination:

2. Did the Ninth Circuit err by failing to find that ZZZZ Best Co., Inc. was engaged in a ponzi scheme and, therefore, that the ordinary course of business exception found in 11 U.S.C. § 547(c)(2) does not protect the payments made to Petitioner?

3. Did the operation of a fraudulent business activity by ZZZZ Best Co., Inc. eliminate the ordinary course of business defense otherwise available to a creditor in a preference action under 11 U.S.C. § 547(c)(2)?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Union Bank, and the Respondent, Herbert Wolas in his capacity as Chapter 7 Trustee of the bankruptcy estate of ZZZZ Best Co., Inc.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT

Herbert Wolas, the Respondent herein, prays that the writ of certiorari sought by Petitioner, Union Bank, to reverse the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on December 28, 1990, be denied.

OPINIONS BELOW

The December 28, 1990 opinion of the Court of Appeals for the Ninth Circuit reverses the judgments of the district and bankruptcy courts. The opinion is reported at 921 F.2d 968 and reprinted as Appendix A to the Petition for Writ of Certiorari (the "Petition") filed by Petitioner, Union Bank, at 1a.

On August 8, 1989, the District Court for the Central District of California entered its Order Affirming Judgment, affirming the summary judgment of the bankruptcy court granted in favor of the Petitioner, Union Bank. The district court order was appealed by the Respondent to the court of appeals. The district court order was not published and is reprinted as Appendix B to the Petition filed by Petitioner, Union Bank, at 3a.

The order of the Bankruptcy Court for the Central District of California granting summary judgment in favor of the Petitioner, from which appeal was taken by the Respondent to the district court, was not published. The bankruptcy court's Judgment on First Cause of Action; Adjudication of Controversies on Fourth Claim for Relief, entered August 23, 1988, and Findings of Fact and Conclusions of Law related thereto, are reprinted in Appendices C and D to this Petition for Writ of Certiorari filed by Petitioner, Union Bank, respectively, at 6a and 10a, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit in favor of Respondent was entered on December 28, 1990, reversing the judgments in favor of the Petitioner entered by the district court and the bankruptcy court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves a lawsuit filed by Respondent, a Bankruptcy Trustee, to recover from Petitioner, Union Bank, certain monthly interest payments and a monthly loan renewal fee as preferential transfers under § 547(b) of the Bankruptcy Code, Title 11 of the United States Code. Section 547(b) provides:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> > (A) on or within 90 days before the date of the filing of the petition; or
> >
> > (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transaction was in insider; and
>
> (5) that enables such creditor to receive more than such creditor would have received if—
>
> > (A) the case were a case under chapter 7 of this title;
> >
> > (B) the transfer had not been made; and
> >
> > (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Petitioner has placed reliance upon certain exceptions to the trustee's ability to avoid certain transfers under 11 U.S.C. § 547 that are set forth in § 547(c). The exception upon which the Petitioner has relied to defend against the Trustee's preference action is § 547(c)(2), which provides as follows:

> (2) to the extent that such transfer was—
>
> > (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor or transferee;
> >
> > (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> >
> > (C) made according to ordinary business terms.

STATEMENT OF THE CASE

On November 25, 1987, the Trustee filed a Complaint against the Petitioner, Union Bank, alleging the receipt of preferential payments made to it by ZZZZ Best Co., Inc. ("ZBest") within 90 days prior to the date ZBest filed for relief under Chapter 11 of the United States Bankruptcy Code. On or about May 10, 1988, Union Bank brought its Motion for Summary Judgment and on May 23, 1988, the Trustee filed his Cross-Motion for Summary Judgment. On August 23, 1988, the Bankruptcy Court entered summary judgment in favor of Union Bank and against the Trustee and denied the Trustee's Cross-Motion for Summary Judgment.

The Trustee then filed his Notice of Appeal on August 29, 1988. After Union Bank objected to the jurisdiction of the Bankruptcy Appellate Panel, this case was referred to the United States District Court for the Central District of California.

On August 8, 1989, the District Court, the Honorable David V. Kenyon presiding, affirmed the Order of the Bankruptcy Court granting summary judgment against the Trustee and in favor of Union Bank. The Trustee timely appealed to the United States Court of Appeals for the Ninth Circuit.

The events giving rise to the making of the preferential payments by ZBest to Union Bank are relatively simple. Essentially, on or about December 14, 1986, ZBest and Union Bank entered into a Revolving Credit Agreement whereby Union Bank agreed to loan ZBest the sum of $7 Million.

To evidence the takedown of the funds, a commercial promissory note (the "Promissory Note") in the amount of $7 Million was executed on December 17, 1986. The Promissory Note indicates a maturity date of August 31, 1987. In addition, the Promissory Note required the payment of interest at the rate of not less than $500.00

per month or 0.650% per year in excess of Union Bank's reference rate, whichever was greater.

As indicated in the Promissory Note, the loan transaction by and between ZBest and Union Bank extended for a period in excess of 8½ months, which is a period in excess of the time within which standard trade credit terms are generally granted. This evidences the long-term and capital nature of the transaction with respect to the financial structure of ZBest as opposed to a transaction constituting the ordinary extension of trade credit by a general trade creditor. In addition, the substantial amount of the loan (i.e., $7 Million) is also reflective of the unusual nature of the transaction. The Promissory Note contains the following language:

> "At any time prior to maturity of this Note, the maker may borrow, repay and reborrow hereon so long as the total outstanding at any one time does not exceed the principal amount of this Note."

Reading the terms of this Promissory Note in conjunction with the language of the Revolving Credit Agreement, it becomes apparent that the transaction by and between ZBest and Union Bank was *not* an ordinary trade credit transaction, but rather, constituted an unusual transaction primarily providing for the extensive funding of ZBest's alleged restoration operations.

The alleged business operation of ZBest with respect to its restoration contracts (which constituted substantially all of ZBest's alleged gross receipts) was a fraud since the alleged restoration contracts never existed and were entirely fictitious. The continuous borrowing and repayment of funds by ZBest from investors and creditors during its fraudulent operation and prior to its filing for relief under Chapter 11 was tantamount to a fraudulent scheme designed to induce investors and/or creditors to extend credit and to repay certain investors and/or creditors in order to induce said persons to further extend larger sums of credit. In essence, the opera-

tion of ZBest, as carried out by its officers and directors, was tantamount to the classic "ponzi" scheme. The end result of the ponzi scheme was the dissipation of all funds provided by investors and/or creditors to areas and/or persons unknown, with a total resulting loss to investors acquiring shares of stock in ZBest and large losses to creditors who extended credit.

After the bankruptcy court and District found for Petitioner, the Respondent Trustee appealed the district court's ruling to the Court of Appeals for the Ninth Circuit.[1] A three-judge panel of the Ninth Circuit reversed in a *per curiam* opinion, relying on the decision of another panel of the court in *CHG Int'l, Inc. v. Barclays Bank (Matter of CHG Int'l, Inc.)*, 897 F.2d 1479 (9th Cir. 1990).

In *CHG Int'l*, the Ninth Circuit held that payments made on *long-term debt do not qualify* for the protection of the "ordinary course of business" exceptions of § 547(c)(2) *as a matter of law*. The Ninth Circuit in the *ZBest* decision held that the eight and one-half-month revolving line of credit constitutes "long-term" debt for the purposes of § 547(c)(2) because one of the two debts in the *CHG Int'l* case had a term of seven months and was held to be long-term debt.

The ruling by the Ninth Circuit in *ZBest* does not conflict with any of the published opinions set forth by the Petitioner in the Petition inasmuch as none of the factual patterns set forth in the cases cited by Petitioner are appropriate to the case at bar. For the reasons hereinafter set forth, Respondent contends that as a matter of law, the Ninth Circuit correctly determined that the revolving line of credit constituted a long-term debt obligation of ZBest and that payments made on account of such indebtedness are not to be afforded protection under the provisions of § 547(c)(2). Specifically, the Petitioner would have this Court emasculate a long line of judicial and statutory protection provided to a debtor and creditors of the debtor's estate by having this Court determine the intent of Congress to do away with all long-standing rules regarding recovery of preference payments on long-term obligations to a lender. The Ninth Circuit *correctly* determined that the applicable exception to recovery of a preference by a trustee for the benefit of the creditors of an estate should only extend to short-term obligations and should not be a rule swallowed up by the exceptions. The Ninth Circuit *correctly* points out that the statute was not modified with the intent to extricate all banks from exposure rather, it was intended to provide assurances to trade creditors that continued financial transactions between the debtor and themselves, resulting in value to the debtor, would not be subject to attack by a trustee so long as value was equally exchanged.

[1] The Ninth Circuit's jurisdiction to hear the appeal is provided by 28 U.S.C. § 158(d) which grants the circuit courts of appeals jurisdiction to hear appeals from final decisions of the district courts entered pursuant to 28 U.S.C. § 158(a) and (b).

The Petitioner's brief falls short of the mark by failing to point out the material fact that no additional value was received by ZBest during the time in which the payments in question were made by ZBest to Petitioner. Rather, the value of all funds received by ZBest were dissipated by it during its operation of a fraudulent activity. The continued perpetration of the fraudulent activity was the direct result of ZBest maintaining the status quo on its long-term debt obligations to Petitioner to avert the Petitioner seeking legal redress resulting in an earlier collapse of its fraudulent business operation.

Furthermore, the Petitioner's Petition does not seek to instruct this Court of the facts surrounding the fraudulent activity conducted by ZBest. Specifically, the ZBest operation was not a legitimate business operation and, as the lower court noted, may not have been sufficient to

constitute a going concern such that the debt obligation incurred by it was incurred in its ordinary course of business inasmuch as ZBest may not have had the financial wherewithall to service the ZBest obligation.

The Petitioner is quick to point out that the Ninth Circuit did not define what constitutes "long-term" debt. However, this is not an appropriate statement. The Ninth Circuit defined what is not short-term debt and, specifically, determined that an eight and one-half-month revolving line of credit was tantamount to a long-term debt obligation.

Further, Petitioner points out at page 8 of the Petition that "the Court of Appeals for the Seventh Circuit has relied upon the availability of § 547(c)(2) to protect lenders from the recovery of ordinary loan payments made up to one year prior to the bankruptcy." [2]

This is an incorrect statement of the case.[3] The Seventh Circuit did not so rule, but rather, indicated, in *dicta*, that potentially, a set of examples propounded by lenders would be determined on a case by case basis and, specifically, that in the case at bar, no determination could be made. The Court's *Deprizio* decision was only to determine the liability of a guarantor. It did *not* contemplate nor rule upon a determination as to whether or not the ordinary course of business extends to long-term debt obligations. Any statement by Petitioner to the contrary is not a true reflection of the case but is merely an opinion of Petitioner based upon *dicta* set forth therein.

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[2] See *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989), *aff'g in part and rev'g in part In re Deprizio Constr. Co.*, 86 Bankr. 545 (N.D.Ill. 1988) [hereinafter referred to as "Deprizio"].

[3] See *Barash v. Public Finance Corp.*, 658 F.2d 504 (7th Cir. 1981).

REASONS FOR DENIAL OF WRIT OF CERTIORARI

The Ninth Circuit correctly determined that the revolving line of credit constituted a long-term debt obligation and, therefore, as a result thereof, the payments made by ZBest to Petitioner, Union Bank, were not within the ordinary course of business of ZBest. In so holding, the Ninth Circuit determined that the plain Congressional intent of the statute was merely to remove an artificial time period for determining the date upon which a debt is incurred and in connection therewith, to focus attention upon the benefit to the estate of the debtor through the value received in exchange for payments made.

It is clear that the Congressional intent of the statute was not to overrule a long line of statutory and judicial history since *no* such meaning can be gleaned from the Congressional reports. Rather, what is clear is that the Congress intended to provide benefit to trade creditors which is more fully set forth at the Notes of Committee on the Judiciary, S. Rep. No. 989, 95th Cong., 2nd Sess. (1978).

In making its argument, the Petitioner attempts to have this Court set forth and define a *bright line* test as to what constitutes a long-term debt or a short-term debt obligation. Petitioner makes reference to generally accepted accounting principles but, however, fails to show their relevancy to a bankruptcy situation. Importantly, it is worth noting that the purpose of the preference provisions is to provide *equality* among creditors and to require disgorgement of amounts received by one creditor for its exclusive benefit and to the detriment of other similarly situated creditors. In such settings, it is also important to note that where a creditor provides value in exchange for the payments received, perhaps a debtor's slide into bankruptcy is minimized. Turning to the facts of the case at bar, it becomes evident that the $7 million loan by Petitioner, Union Bank, to ZBest, was

not an ordinary transaction. Rather, it was an extraordinary transaction. The funds were provided in December, 1986, seven months prior to the date upon which ZBest filed for protection from creditors. All funds provided by Petitioner, Union Bank, were dissipated by ZBest in its operation. To that extent, the payments of monthly interest accruals (which Petitioner alleges to be ordinary payments) could not possibly have provided any benefit to the estate other than to merely hold off the Petitioner from seeking to enforce its provisions of default under its loan agreements. However, Petitioner can point to *no* benefit to ZBest resulting from the payments made allegedly in ZBest's ordinary course of its business.

In addition, the Ninth Circuit did not rule upon the issue of whether or not the existence of the ZBest's fraudulent ponzi scheme operation eliminates the availability of the ordinary course of business exception to a creditor since one engaging in such an activity cannot be said to be engaging in an "ordinary" business.

This Court should not lightly undertake the task to rewrite a statute. Respondent opines that statute writing is best left to the legislative branch which, if Petitioner believes does not correctly set forth a predominant test, should be addressed by additional legislation.

The Petitioner argues for the issuance of the writ by determining that the Ninth Circuit failed to appropriately provide a measurable standard. However, the Ninth Circuit in fact, did provide a standard both in *CHG Int'l* and in the case at bar by simply determining that an obligation of longer than six months is long-term in nature for purposes of the Bankruptcy Code.

For the reasons set forth herein, the Respondent believes that the ruling by the Ninth Circuit is not contrary to the rulings of other circuit courts and correctly maintains the integrity, purpose and scope of the pref-

erence provisions without emasculating it by supposed statutory exceptions.

I. THE *ZBEST* DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS AND IS IN CONFORMITY WITH THE LEGISLATIVE AND JUDICIAL HISTORY OF THE STATUTE.

Petitioner, Union Bank, argues that the decision of the Ninth Circuit does not comport to the clear and plain language of the statute. Petitioner bases this argument upon amendments made to the statute in 1984 pursuant to which the 45-day limitation was deleted. Respondent opines that the decision of the Ninth Circuit is not contrary to other circuit courts who have ruled upon the propriety of § 547(c)(2) as most notable *Marathon Oil Co. v. Flatau (In re Craig Oil Co.)*, 785 F.2d 1563 (11th Cir. 1986). Specifically, in the Eleventh Circuit Court of Appeals decision, a "trade" creditor sought to avoid attack by the Chapter 11 trustee to recover payments made by a debtor as a preference under the provisions of § 547(b). As the Eleventh Circuit noted at page 1567:

> "As several courts have noted, this exception is directed primarily to ordinary trade credit transactions. These typically involve some extension of credit that are meant to be paid in full within a single billing cycle . . . Because the credit extended is meant to be extremely short term, Congress likened payment of trade credit to payment of current expenses. Recognizing that the latter had traditionally been protected from avoidance in bankruptcy, Congress insisted on the same protection to trade credit through the ordinary course of business provision . . . Since the foundation of this provision is the similarity of trade credit and current expenses rule, the scope of its protection is necessarily limited to trade credit which is 'kept current' or other trans-

actions which are paid in full within the initial billing cycle.[4]

It is interesting to note that the Eleventh Circuit in the *Marathon* decision cites *Barash v. Public Finance Corp., supra*, which coincides with the jurisdiction presiding over the *Deprizio* decision cited by Petitioner in its moving papers. In *Deprizio*, the Seventh Circuit did not overrule the *Barash* decision, nor was that decision ever discussed. More importantly, the *Deprizio* court, at page 1199 specifically states that:

> "We need not decide whether installment payments before 1984 may be recovered even though made within forty-five days of their due date, because this appeal does not present for decision the trustee's effort to recoup any particular transfer. It is enough to observe that § 547(b)(5) and (c), both *before and after amendment* exclude from recovery the bulk of ordinary commercial payments." [Emphasis Added]

As pointed out, Respondent urges this Court to note that the Seventh Circuit did not reverse the *Barash* decision which supports the finding by the Ninth Circuit in its *CHG* and *ZBest* opinion, respectively, and more so, that the *Deprizio* decision does not go directly to the merits of the case at bar. As such, the *Deprizio* decision is inappropriate for consideration in the case at bar.

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[4] As the Eleventh Circuit pointed out in Footnote No. 8 at page 1567, 'it was for this reason that Congress originally required payment within forty-five days of incurring the obligation. This period represents a normal trade cycle.' Furthermore, Petitioner notes that there *may* also be a conflict with the Eighth Circuit based upon *Iowa Premium Serv. Co., Inc. v. First Nat'l Bank in St. Louis, etc. (In re Iowa Premium Serv. Co., Inc.)*, 695 F.2d 1109 (8th Cir. 1982). However, Petitioner's argument is misplaced since the parties thereto *stipulated* to the fact that the ordinary course of business exception applied and that the only issue was the date upon which the debt was incurred. As such, *Iowa Premium* is completely inapplicable to the case at bar.

More importantly, the Eleventh Circuit decision in *Marathon* supports the holding by he Ninth Circuit in *ZBest*.

What the Seventh Circuit, Ninth Circuit and Eleventh Circuit have recognized is that the scope and purpose of § 547(c)(2) was not changed by the mere deletion of a forty-five day artificial rule but instead, attention must be focused upon the value derived by a debtor in exchange for the payments being made. It is, of course, this presumption that enables creditors to avoid attack by a trustee seeking to recover alleged preference payments when the value received by the debtor in exchange for the payments have allowed the debtor to continue to operate its business. In the case at bar, the funds were drawn down by *ZBest* over seven months prior to its filing for protection from creditors. The continued payments of interest did not serve to enhance the business of ZBest but merely prolonged the ponzi scheme/fraudulent business by taking under its umbrella additional victims.

II. WHERE THE STATUTE IS UNCLEAR ON ITS FACE, THE INTENTION OF THE DRAFTERS SHOULD GOVERN.

In *United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), this Court found the statutory language of § 506(b) to be clear on its face and, therefore, this Court enforced said provisions according to its terms. Nevertheless, this Court was quick to note, at 1031, that:

> "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters . . . In such cases, the intention of the drafters, rather than the strict language, controls." (Citations omitted.)

Petitioner would have this Court believe that the amendments to § 547(c)(2) in 1984, evidenced a Congressional

intent to include long-term debt within the statutory exceptions to a trustee's avoiding power. However, this Congressional intent is far from clear. As suggested by one leading commentator, the best future for § 547 (c) (2) is repeal due to the absence of "rational confining limits." See Countryman, *The Concept of a Voidable Preference In Bankruptcy*, 38 Vand.L.Rev. 713 (1985). Unless legislative intent is clearly demonstrated to *repeal* the substance of preference powers on long-term debt, this Court should be slow to reverse a long-standing rule absent clear and convincing evidence of such an intent.[5]

The judicial interpretation by the Ninth Circuit maintains the integrity of the preference powers and is reasonable and consistent with respect to long-term debt. The preferential payments made by ZBest to Petitioner did *not* provide any current benefit (value) to ZBest at the time they were made. There was merely a depletion of ZBest's estate. The proper remedy for depletion is restoration—this is best accomplished by the preference powers.

III. THE HOLDING BY THE NINTH CIRCUIT ENFORCES A LONG-STANDING POLICY THAT PAYMENTS ON LONG-TERM OBLIGATIONS SERVE NO BENEFIT TO THE DEBTOR AND MUST BE AVOIDED.

As the Petitioner correctly points out in its moving papers, two policies underlie the preference law, those being:

[5] The Sixth Circuit in *Gosch v. Burns (In re Finn)*, 909 F.2d 903 (6th Cir. 1990) discusses *Ragsdale v. Citizens and S. Nat'l Bank (In re Control Elec., Inc.)*, 91 Bankr. 1010 (Bankr.N.D.Ga. 1988) and disagreed with the general proposition that without legislative history to back it up, a change in the language of the statute is not to be respected. See also, *Waldschmidt v. Ranier (In re Fulghum Construction Corp.)*, 872 F.2d 739 (6th Cir. 1989), wherein 547(c)(2) protection was made available to repayments of "short-term" cash arvances.

1. To discourage a "race to the courthouse;" and

2. Dismemberment of the debtor during the debtor's financial decline and to equalize the distribution of assets of the estate among similarly situated creditors.

However, Petitioner's argument falls short of demonstrating why its financial arrangement with ZBest and the preferential payments it received merit consideration as being outside the scope of these two policies.

Specifically, the transaction between Union Bank and ZBest did not represent a "normally reoccurring transaction" since the $7 million loan by Union Bank to ZBest vastly exceeded any other normal credit transaction which ZBest engaged in. This large loan was utilized to enhance and in furtherance of the ZBest fraudulent business enterprise.

While Petitioner may argue that its loan should be aligned with a sale of commercial paper, it is worth noting that the seller of commercial paper (a financial institution) is making a sale of inventory in the ordinary course of its business. It is obvious that it was the debtor/seller of commercial paper that sought protection since if it was unable to sell its inventory, its slide into bankruptcy would be accomplished at a much quicker pace. However, through the redemption of commercial paper it is once again able to reenter the money market and obtain additional capital infusions for its continued operations.[6] These facts are diametrically opposed to the facts of the case at bar. Specifically, Union Bank made one (1), segregated loan to ZBest which had a matura-

[6] The Tenth Circuit decision in *Fidelity Sav. & Inv. Co. v. New Hope Baptist*, 880 F.2d 1172 (10th Cir. 1989) clearly demonstrates these considerations by the Senate in discussing commercial paper redemptions. Additionally, see *CHG Int'l, supra*, in which, at fn. 11, the Ninth Circuit determined the *Fidelity* opinion to be weak, and noted that the *Fidelity* court expressly refused to decide whether it agreed with cases that hold that long-term loans are excepted from treatment as a preference.

tion date of over eight months. The policy discussed by the Senate in modifying the provisions of commercial paper sought to normalize the trade credit transactions in selling short term commercial paper. If Congress had intended to totally emasculate the preference provisions, then Congress should have specifically stated that the exception provided by § 547(c)(2) is not limited to normal trade credit transactions but rather, encompasses all transactions between a debtor and *any* creditor. Congress did not intend and this Court should be leery of rewriting a statute which has a long history of judicial decisions which Congress did not expressly intend to overrule.

IV. THE NINTH CIRCUIT, RELYING ON *CHG INT'L, INC.*, PROPERLY DETERMINED THAT PREFERENTIAL PAYMENTS UPON A LONG-TERM DEBT INSTRUMENT ARE OUTSIDE THE SCOPE OF THE PROTECTION AFFORDED BY § 547(c)(2).

In its *CHG Int'l* decision, the Ninth Circuit *correctly* pointed out that § 547(c)(2) "was intended to complement the contemporaneous exchange section," at 1483. In so finding, the Ninth Circuit relied upon the Seventh Circuit decision in *Barash*.[7] Moreover, the Ninth Circuit, at 1483, correctly pointed out that:

> "The rationale for both the old 'current expense' rule and for § 547(c)(2) exception is the same: the payment does not diminish the estate, is not for an antecedent debt, and allows the debtor to remain in business."

In the case at bar, the preferential transfers from ZBest to Petitioner, Union Bank:

(1) Dimished the estate;

(2) Were on account of an antecedent debt; and

[7] See also *Matter of Xonics Imaging Inc.*, 837 F.2d 763, 766 (7th Cir. 1988).

(3) Did nothing to allow ZBest to remain in business.

Respondent urges this Court to recognize, as did the Ninth Circuit in *CHG Int'l*, that the better view is that Congress did *not* intend to fundamentally change the preference avoiding powers but rather, to only eliminate an artificial time limit.

V. THE ORDINARY COURSE OF BUSINESS EXCEPTION IS INAPPLICABLE TO A CREDITOR WHEREIN THE DEBTOR HAS ENGAGED IN A PONZI/FRAUDULANT BUSINESS SCHEME.

As argued in the lower court, but not decided by the Ninth Circuit in the *ZBest* decision, a line of cases has developed which holds that a debtor who engages in a ponzi/fraudulent business enterprise cannot be deemed to be operating an ordinary business and, therefore, creditors are unable to rely upon the ordinary course of business exception provided by § 547(c)(2) to avoid a preference attack by a trustee. See *Danning v. Bozek (In re Bullion Reserve of North America)*, 836 F.2d 1214 (9th Cir. 1988), *Graulty v. Brooks (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 819 F.2d 214 (9th Cir. 1987).

While the Ninth Circuit did not reach this issue (as a result of its determination that the obligation owed by ZBest to Union Bank was a long-term debt obligation), if this Court should determine that the arguments of Petitioner have merit, then this Court must address the subsidiary issue which the Ninth Circuit failed to address. As aptly stated by the Ninth Circuit in *Bullion Reserve* and *Graulty*, respectively, the protection afforded under § 547(c)(2) was not intended to protect one victim of the debtor's fraud at the expense of others. Where a debtor engages in activities which are tantamount to a ponzi scheme/fraudulent business enterprise the debtor may not be said to be operating a legitimate

trade or business and, therefore, no transaction can be considered "ordinary."

CONCLUSION

WHEREFORE, Respondent, Herbert Wolas, prays that a writ of certiorari sought by Petitioner from this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit for In re ZZZZ Best Co., Inc. be denied. Respondent requests that the judgment of the Court of Appeals for the Ninth Circuit be sustained.

Respectfully submitted,

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